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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| TAMARA SUE TENBARGE, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 93A02-0611-EX-1023 |
| | ) | |
| ENCORE HEALTHCARE NETWORK, | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Application No. C-171324

**April 16, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Tamara Sue Tenbarge appeals from the Worker's Compensation Board's ("the Board") dismissal of her Application for Adjustment of Claim ("Claim"). Tenbarge presents a single issue for our review, namely, whether the Board erred when it determined that her injury did not arise out of her employment.

We affirm.

## FACTS AND PROCEDURAL HISTORY[1]

On June 12, 2006, a Single Hearing Member of the Board held a hearing on Tenbarge's Claim. On June 15, that Hearing Member described the facts, in relevant part, as follows:

> 1. On July 7, 2003, Plaintiff [Tenbarge] began her employment with Defendant Encore Health Network [("Encore")] as a Preferred Provider Organization Account Executive.
>
> * * *
>
> 3. As a PPO Account Executive, Plaintiff marketed the network to insurance agents, brokers, employers, and third-party administrators.
>
> 4. Plaintiff's territory included Southern Indiana, part of Western Kentucky, and a small portion of Illinois.
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> * * *
>
> 6. [Encore] provided Plaintiff [with] an office at her home . . . . Plaintiff designated a room in her home as an office. She had a computer, internet access, telephone, fax machine, copier, and a desk and chair.

[1] In her appellate brief, Tenbarge fails to support her recitation of facts "by page references to the Record on Appeal or Appendix." See Ind. Appellate Rule 46(A)(6)(a). Nonetheless, she did attach the Board's decision, which included special findings of fact. Thus, we ignore Tenbarge's Statement of Facts insofar as those facts conflict with those adopted by the Board.

7. Plaintiff's job required her to travel in her territory approximately three days a week. Occasionally, Plaintiff's job required her to spend the night at some locations.

8. Plaintiff did not have a company car, but received reimbursement checks for her mileage.

* * *

10. On February 3, 2004, Plaintiff was scheduled to drive to Columbus, Indiana[,] to meet with [Defendant's director of sales] Ms. Revell and some clients. Thereafter, Plaintiff was scheduled to travel to Indianapolis to attend training.

* * *

12. At approximately 5:50 a.m. on February 3, Plaintiff walked out of her house with her computer bag, travel bag, and purse in hand. As she approached her car parked in the driveway, Plaintiff slipped on a patch of "black ice" in the driveway, resulting in her landing on her left wrist.

13. There were no witnesses to the accident.

14. After the fall, Plaintiff went back into her house and advised her husband of her fall. Thereafter, Plaintiff's husband took her to the hospital.

15. Upon arriving at the hospital, the hospital's staff x-rayed Plaintiff's left wrist and gave her medication.

16. Plaintiff was diagnosed with a left wrist fracture and underwent surgery on February 3, 2004.

17. In the afternoon of February 3, 2004, Plaintiff was discharged from the hospital.

18. On February 6, 2004, Plaintiff returned to the hospital for a second scheduled surgery on her left wrist.

19. Plaintiff was off work for approximately three weeks.

20. Plaintiff's health insurance paid for eighty percent (80%) of her surgery, and paid for twenty (20) physical therapy visits.

21. On September 7, 2004, Plaintiff submitted an Employee Accident Report.

22. Plaintiff has been assigned a PPI rating of thirteen percent (13%) impairment of the upper extremity.

23. On September 8, 2004, Plaintiff filed her original [Claim]. Plaintiff filed subsequent claims on October 20, 2004[,] and January 10, 2005.

* * *

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On February 3, 2004, Plaintiff sustained personal injury in the course of her employment with Defendant.

2. The facts and evidence do not establish that Plaintiff's February 3, 2004[,] injury arose out of her employment with Defendant.

Appellee's Brief at 1-3.

On July 10, 2006, Tenbarge filed an application for review by the Full Board. On October 23, the Board held a hearing, and on October 26 the Board adopted the Single Hearing Member's ruling. This appeal ensued.

**DISCUSSION AND DECISION**

When reviewing the decisions of the Board, we are bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. Eads v. Perry Twp. Fire Dep't, 817 N.E.2d 263, 265 (Ind. Ct. App. 2004), trans. denied. Additionally, all unfavorable evidence must be disregarded in favor of an examination of only that evidence and the reasonable inferences therefrom which support the Board's findings. Id. Moreover, we neither reweigh the evidence nor judge the witness's credibility. Id. We review

questions of law de novo. Prentoski v. Five Star Painting, Inc., 827 N.E.2d 98, 101 (Ind. Ct. App. 2005), aff'd in part, adopted in part, 837 N.E.2d 972 (Ind. 2005).

Tenbarge contends that the Board erred when it found that her injury did not arise out of her employment with Encore. Whether an injury arises out of and in the course of employment is a question of fact to be determined by the Board. Manous, LLC v. Manousogianakis, 824 N.E.2d 756, 763 (Ind. Ct. App. 2005). Both requirements must be met before compensation is awarded, and neither alone is sufficient.[2] Id. The person who seeks worker's compensation benefits bears the burden of proving both elements. Id.

"An injury 'arises out of' employment when a causal connection exists between the injuries sustained and the duties or services performed by the injured employee." Knoy v. Cary, 813 N.E.2d 1170, 1171 (Ind. 2004). "A causal connection exists when a reasonable person would consider the injury to be the result of a risk incidental to employment or when there is a connection between employment and the injury." Id. The "risks incidental to employment" fall into three categories: (1) risks distinctly associated with employment, (2) risks personal to the claimant, and (3) risks of neither distinctly employment nor distinctly personal character. Milledge v. The Oaks, 784 N.E.2d 926, 930 (Ind. 2003). Risks that fall within categories numbered one and three are generally covered under the Indiana Worker's Compensation Act. Id. However risks personal to the claimant, those "caused by a pre-existing illness or condition unrelated to employment," are not compensable. Id.

[2] Encore does not challenge the Board's finding that Tenbarge's injuries occurred in the course of her employment.

Here, Tenbarge maintains that "the risk of fall, going to or from her auto[,] is [either] neutral or . . . distinctly associated with her employment." Appellant's Brief at 5. We cannot agree. Category (3), involving risks of neutral character, requires an analysis under "the positional risk doctrine." Milledge, 784 N.E.2d at 931-32. Under that doctrine "an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured." Id. at 931. However, after acknowledging the relevant law in this area, Tenbarge wholly fails to apply that law to the facts of her case or to provide any cogent reasoning as to how that law might apply. As such, Tenbarge has waived this issue. See Ind. Appellate Rule 46(A)(8)(a). That waiver notwithstanding, we have held that "[t]he hallmark characteristic of a neutral risk is its inexplicable nature." Manous, 824 N.E.2d at 764. See Milledge, 784 N.E.2d at 933. But Tenbarge's risk is easily explained: while approaching her car in her driveway, she slipped on ice, fell, and consequently injured her wrist. Thus, the risk is not neutral.

Tenbarge's risk also is not distinctly associated with her employment. As our supreme court explained, "[t]he underlying theme [to this category of risk] is that the injury sustained by the claimant was the result of conditions inherent in the work environment." Milledge, 784 N.E.2d at 930. Examples of risks falling into the first category include an electrician being burned while measuring the voltage in a circuit breaker at a factory, an employee's finger being severed while operating machinery, and an employee being electrocuted when excavating a sewer line after a co-worker struck a buried power line. See id. Here, however, Tenbarge simply slipped on ice in her

driveway while walking to her car. That risk is not "inherent" in nor "distinctly associated with" her employment with Encore. Rather, such a risk is "not incidental to [her] employment because the public at large is also subjected to that same risk . . . on a daily basis, regardless of where they are employed." Luong v. Chung King Express, 781 N.E.2d 1181, 1185 (Ind. Ct. App. 2003) (quoting Conway v. School City of E. Chicago, 734 N.E.2d 594, 599 (Ind. Ct. App. 2000), trans. denied), trans. denied.

The nature of the risk to Tenbarge was "caused by a pre-existing . . . condition unrelated to employment," namely, ice on her driveway. See Milledge, 784 N.E.2d at 930. As such, that risk was personal in nature. Risks that are personal in nature are not compensable. Id. Thus, the risk did not "arise out of" her employment with Encore, and the Board did not err in its decision.

Affirmed.

RILEY, J., and BARNES, J., concur.